

the soldier is exempt. His determination is final.

(d) The exemption determination authority will notify responsible state or local officials whenever a soldier summoned for jury duty is exempt. The notification will cite 10 U.S.C. 982 as authority.

#### **§ 516.78 Status, fees, and expenses.**

(a) Soldiers who are required to comply with summons to serve on state or local juries will be placed on permissive TDY under the provisions of AR 630-5.

(b) Jury fees accruing to soldiers for complying with the summons to serve on state and local juries must be turned over to the appropriate finance office for deposit into the U.S. Treasury. Commands will establish procedures with local authorities and their servicing finance and accounting activity to ensure that such jury fees are so deposited. Soldiers, however, may keep any reimbursement from state or local authority for expenses incurred in the performance of jury duty, including transportation, meals, and parking.

#### **APPENDIX A TO PART 516—REFERENCES**

Publications referenced in this part can be obtained at the National Technical Information Services, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

##### *Required Publications*

- AR 25-55, The Department of the Army Freedom of Information Act Program. (Cited in §§ 516.40, 516.72)
- AR 27-10, Military Justice. (Cited in § 516.4)
- AR 27-20, Claims. (Cited in §§ 516.4, 516.33, 516.22)
- AR 27-60, Patents, Inventions, and Copyrights.
- AR 37-60, Pricing for Material and Services. (Cited in § 516.43.)
- AR 37-103, Finance and Accounting for Installations: Disbursing Operations. (Cited in § 516.22.)
- AR 60-20, Operating Policies. (Cited in § 516.22.)
- AR 190-9, Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies. (Cited in § 516.9)
- AR 210-47, State and Local Taxation of Lessee's Interest in Wherry Act Housing (Title VIII of the National Housing Act).
- AR 215-1, Administration of Army Morale, Welfare, and Recreation Activities and

Nonappropriated Fund Instrumentalities. (Cited in § 516.22.)

- AR 215-2, The Management and Operation of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in § 516.22.)
- AR 310-1, Publications, Blank Forms, and Printing Management.
- AR 340-21, The Army Privacy Program. (Cited in §§ 516.40, 516.72.)
- AR 380-5, Department of the Army Information Security Program.
- AR 405-25, Annexation. (Cited in § 516.22.)
- AR 630-5, Leaves and Passes. (Cited in §§ 516.55, 516.77, 516.78.)
- AR 630-10, Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings. (Cited in § 516.9)

##### *Related Publications*

A related publication is merely a source of additional information. The user does not have to read it to understand the regulation.

- AR 20-1, Inspector General Activities and Procedures. (Cited in §§ 516.41, 516.72.)
- AR 27-1, Judge Advocate Legal Service.
- AR 27-3, Legal Assistance. (Cited in § 516.6.)
- AR 27-10, Military Justice. (Cited in §§ 516.4, 516.5, 516.15.)
- AR 27-50, Status of Forces Policies, Procedures, and Information. (Cited in § 516.15.)
- AR 37-104-3, Military Pay and Allowances Procedures.
- AR 37-105, Finance and Accounting for Installations: Civilian Pay Procedures.
- AR 55-19, Marine Casualties. (Cited in § 516.22.)
- AR 190-29, Misdemeanors and Uniform Violation Notices Referred to U.S. Magistrates or District Courts.
- AR 190-40, Serious Incident Report. (Cited in § 516.15.)
- AR 210-50, Family Housing Management. (Cited in § 516.37.)
- AR 335-15, Management Information Control System. (Cited in § 516.15.)
- AR 600-40, Apprehension, Restraint, and Release to Civil Authorities.
- AR 600-50, Standards of Conduct for Department of the Army Personnel.
- AR 690-700, Personnel Relations and Services. (Cited in § 516.70.)

##### *Prescribed Form*

- DA Form 4, Department of the Army Certification for Authentication of Records. (Prescribed in § 516.25, 516.35.)

##### *Referenced Forms*

- DA Form 2631-R, Medical Care-Third Party Liability Notification.
- DA Form 3154, MSA Invoice and Receipt.

## APPENDIX B TO PART 516—MAILING ADDRESSES

The following is a list of frequently referred to Department of the Army Services/Divisions/Offices and their mailing addresses:

- COMMANDER (JACS-Z), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755-5360
- (1) PERSONNEL CLAIMS AND RECOVERY DIVISION (JACS-PC), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755-5360
  - (2) TORT CLAIMS DIVISION (JACS-TC), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755-5360
- CONTRACT APPEALS DIVISION, HQDA(DAJA-CA), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
- CONTRACT LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200
- CRIMINAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200
- ENVIRONMENTAL LAW DIVISION, HQDA(DAJA-EL), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
- LABOR AND EMPLOYMENT LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200
- LITIGATION DIVISION, HQDA(DAJA-LT), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
- (1) CIVILIAN PERSONNEL BRANCH, HQDA(DAJA-LTC), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
  - (2) GENERAL LITIGATION BRANCH, HQDA(DAJA-LTG), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
  - (3) MILITARY PERSONNEL BRANCH, HQDA(DAJA-LTM), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
  - (4) TORT BRANCH, HQDA(DAJA-LTT), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
- PERSONNEL, PLANS, AND TRAINING OFFICE, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200
- PROCUREMENT FRAUD DIVISION, HQDA(DAJA-PF), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837
- INTELLECTUAL PROPERTY DIVISION, HQDA(JALS-IP), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837

REGULATORY LAW OFFICE, HQDA(JALS-RL), 901 NORTH STUART STREET, ARLINGTON, VA 22203-1837

THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200

THE AJAG FOR CIVIL LAW & LITIGATION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310-2200

U.S. ARMY TRIAL DEFENSE SERVICE, HQDA(JALS-TD), NASSIF BUILDING, FALLS CHURCH, VA 22041-5013

## APPENDIX C TO PART 516—DEPARTMENT OF DEFENSE DIRECTIVE 5405.2, RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DoD PERSONNEL AS WITNESSES

*Department of Defense Directive*

July 23, 1985, Number 5405.2, GC, DOD

Subject: Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses

## References:

- (a) Title 5, United States Code, Sections 301, 552, and 552a
- (b) Title 10, United States Code, Section 133
- (c) DoD Directive 5220.6, "Industrial Personnel Security Clearance Program," December 20, 1976
- (d) DoD Directive 5200.1-R, "Information Security Program Regulation," August 1982, authorized by DoD Directive 5200.1, June 7, 1982
- (e) DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984
- (f) DoD Instruction 7230.7, "User Charges," January 29, 1985
- (g) DoD Directive 5400.7-R, "DoD Freedom of Information Act Program," December 1980, authorized by DoD Directive 5400.7, March 24, 1980

*A. Purpose*

Under Section 301 reference (a) and reference (b), this Directive establishes policy, assigns responsibilities, and prescribes procedures for the release of official DoD information in litigation and for testimony by DoD personnel as witnesses during litigation.

*B. Applicability and Scope*

1. This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as "DoD Components"), and to all personnel of such DoD Components.

2. This Directive does not apply to the release of official information or testimony by DoD personnel in the following situations:

a. Before courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component;

b. Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

c. In response to requests by Federal Government counsel in litigation conducted on behalf of the United States;

d. As part of the assistance required in accordance with the Defense Industrial Personnel Security Clearance Program under DoD Directive 5220.6 (reference (c)); or

e. Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

3. This Directive does not supersede or modify existing laws or DoD programs governing the testimony of DoD personnel or the release of official DoD information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 (reference (a)) or the Privacy Act, 5 U.S.C. Section 552a (reference (a)), nor does this Directive preclude treating any written request for agency records that is not in the nature of legal process as a request under the Freedom of Information or Privacy Acts.

4. This Directive is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

5. This Directive does not preclude official comment on matters in litigation in appropriate cases.

6. This Directive is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the United States or the Department of Defense.

#### C. Definitions

1. Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority for the production, disclosure, or release of official DoD information or for the appearance and testimony of DoD personnel as witnesses.

2. DoD Personnel. Present and former U.S. military personnel; Service Academy cadets and midshipmen; and present and former civilian employees of any Component of the Department of Defense, including non-appropriated fund activity employees; non-U.S. nationals who perform services overseas, under the provisions of status of forces agreements, for the United States Armed Forces; and other specific individuals hired through contractual agreements by or on behalf of the Department of Defense.

3. Litigation. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

4. Official Information. All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.

#### D. Policy

It is DoD policy that official information should generally be made reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

#### E. Responsibilities

1. The General Counsel, Department of Defense (GC, DoD), shall provide general policy and procedural guidance by the issuance of supplemental instructions or specific orders concerning the release of official DoD information in litigation and the testimony of DoD personnel as witnesses during litigation.

2. The Heads of DoD Components shall issue appropriate regulations to implement this Directive and to identify official information that is involved in litigation.

#### F. Procedures

##### 1. Authority to Act

a. In response to a litigation request or demand for official DoD information or the testimony of DoD personnel as witnesses, the

General Counsels of DoD, Navy, and the Defense Agencies; the Judge Advocates General of the Military Departments; and the Chief Legal Advisors to the JCS and the Unified and Specified Commands, with regard to their respective Components, are authorized—after consulting and coordinating with the appropriate Department of Justice litigation attorneys, as required—to determine whether official information originated by the Component may be released in litigation; whether DoD personnel assigned to or affiliated with the Component may be interviewed, contacted, or used as witnesses concerning official DoD information or as expert witnesses; and what, if any, conditions will be imposed upon such release, interview, contact, or testimony. Delegation of this authority, to include the authority to invoke appropriate claims of privilege before any tribunal, is permitted.

b. In the event that a DoD Component receives a litigation request or demand for official information originated by another Component, the receiving Component shall forward the appropriate portions of the request or demand to the originating Component for action in accordance with this Directive. The receiving Component shall also notify the requestor, court, or other authority of its transfer of the request or demand.

c. Notwithstanding the provisions of paragraphs F.1.a. and b., the GC, DoD, in litigation involving terrorism, espionage, nuclear weapons, intelligence means or sources, or otherwise as deemed necessary, may notify Components that GC, DoD, will assume primary responsibility for coordinating all litigation requests and demands for official DoD information or the testimony of DoD personnel, or both; consulting with the Department of Justice, as required; and taking final action on such requests and demands.

#### 2. Factors to Consider

In deciding whether to authorize the release of official DoD information or the testimony of DoD personnel concerning official information (hereinafter referred to as “the disclosure”) pursuant to paragraph F.1., DoD officials should consider the following types of factors:

a. Whether the request or demand is unduly burdensome or otherwise inappropriate under the applicable court rules;

b. Whether the disclosure, including release in camera, is appropriate under the rules of procedure governing the case or matter in which the request or demand arose;

c. Whether the disclosure would violate a statute, executive order, regulation, or directive;

d. Whether the disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege;

e. Whether the disclosure, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified pursuant to the DoD Information Security Program under DoD 5200.1-R (reference (d)), unclassified technical data withheld from public release pursuant to DoD Directive 5230.25 (reference (e)), or other matters exempt from unrestricted disclosure; and

f. Whether disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

#### 3. Decisions on Litigation Requests and Demands

a. Subject to paragraph F.3.e., DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in paragraph F.1. Oral approval may be granted, but a record of such approval shall be made and retained in accordance with the applicable implementing regulations.

b. If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph F.3.e., DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph F.1. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

c. Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the DoD official designated in paragraph F.1. for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demands. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

d. If, after DoD personnel have received a litigation request or demand and have in

turn notified the appropriate DoD official in accordance with paragraph F.3.c., a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph F.1. shall furnish the requestor or the court or other authority with a copy of this Directive and applicable implementing regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending a final determination by the Component concerned.

e. If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to paragraph F.3.d., or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's ruling or order will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### 4. Fees

Consistent with the guidelines in DoD Instruction 7230.7 (reference (f)), the appropriate officials designated in paragraph F.1. are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand, official DoD information not otherwise available under the DoD Freedom of Information Act Program (reference (g)). Such fees, in amounts calculated to reimburse the Government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the request or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

#### 5. Expert or Opinion Testimony

DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing

by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph F.1. may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction, or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel, DoD, within 120 days.

Signed by William H. Taft, IV  
*Deputy Secretary of Defense.*

#### APPENDIX D TO PART 516—DEPARTMENT OF DEFENSE DIRECTIVE 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES

##### *Department of Defense Directive*

June 7, 1989, Number 7050.5, IG, DOD

Subject: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

##### References:

- (a) DoD Directive 7050.5, subject as above, June 28, 1985 (hereby canceled)
- (b) Public Law 97-291, "The Victim and Witness Protection Act of 1982," October 12, 1982
- (c) Defense FAR Supplement (DFARS), Subpart 4.6, "Contract Reporting"
- (d) DoD Instruction 4105.61, "DoD Procurement Coding Manual," May 4, 1973
- (e) DoD 4105.61-M, "Procurement Coding Manual" (Volume I), October 1988, authorized by DoD Instruction 4105.61 May 4, 1973

#### A. Reissuance and Purpose

This Directive reissues reference (a) to update policies, procedures, and responsibilities for the coordination of criminal, civil, administrative, and contractual remedies stemming from investigation of fraud or corruption related to procurement activities.

More effective and timely communication of information developed during such investigations will enable the Department of Defense to take the most appropriate of the available measures.

#### *B. Applicability*

This Directive applies to the Office of the Secretary of Defense (OSD); the Inspector General, Department of Defense (IG, DoD); the Military Departments; the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as "DoD Components").

#### *C. Definitions*

1. *DoD Criminal Investigative Organizations.* Refers to the U.S. Army Criminal Investigation Command; the Naval Investigative Service Command; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the IG, DoD (OIG, DoD).

2. *Significant.* Refers to all fraud cases involving an alleged loss of \$100,000, or more; all corruption cases related to procurement that involved bribery, gratuities, or conflicts of interest; and any investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated, regardless of loss value.

#### *D. Policy*

It is DoD policy that:

1. Each of the DoD Components shall monitor, from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organizations, for the purpose of ensuring that all possible criminal, civil, administrative, and contractual remedies in such cases are identified to cognizant procurement and command officials and that appropriate remedies are pursued expeditiously. This process shall include appropriate coordination with all other affected DoD Components.

2. All investigations of fraud or corruption related to procurement activities shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations.

3. Appropriate civil, contractual, and administrative actions, including those set forth in enclosure 1, shall be taken expeditiously. During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, such actions shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense

and the Department of Justice (DoJ). When appropriate, such actions shall be taken before final resolution of the criminal or civil case.

#### *E. Responsibilities*

1. The *Heads of DoD Components* shall:

a. Establish a centralized organization (hereafter referred to as "the centralized organization") to monitor and ensure the coordination of criminal, civil, administrative, and contractual remedies for each significant investigation of fraud or corruption related to procurement activities affecting the DoD Component.

b. Establish procedures requiring the centralized organization to discuss regularly with the assigned DoD criminal investigative organization(s) such issues as the current status of significant investigations and their coordination with prosecutive authorities.

c. Establish procedures requiring that all coordination involving the DoJ, during the pendency of a criminal investigation, is accomplished by or with the advance knowledge of the appropriate DoD criminal investigative organization(s).

d. Establish procedures to ensure appropriate coordination of actions between the centralized organizations of any DoD Components affected by a significant investigation of fraud or corruption related to procurement activities.

e. Establish procedures to ensure that all proper and effective civil, administrative, and contractual remedies available to the Department of Defense are, when found applicable and appropriate, considered and undertaken promptly by the necessary DoD officials (e.g., commanders, programs officials, and contracting officers). This includes initiation of any suspension and debarment action within 30 days of an indictment or conviction. The centralized organization shall ensure that all proposed actions are coordinated with appropriate investigative organization.

f. Establish procedures to ensure that a specific comprehensive remedies plan is developed for each significant investigation involving fraud or corruption related to procurement activities. These procedures shall include the participation of the appropriate DoD criminal investigative organization in the development of the plan.

g. Establish procedures to ensure that in those significant investigations of fraud or corruption related to procurement activities when adverse impact on a DoD mission can be determined, such adverse impact is identified and documented by the centralized organization. This information is to be used by the centralized organization of the DoD Component concerned in development of the remedies plan required in paragraph E.1.f., above, and shall be furnished to prosecutors

as stated in paragraph E.2.e., below. The information shall also be used by the centralized organizations in development and preparation of "Victim Impact Statements" for use in sentencing proceedings, as provided for P.L. 97-291 (reference (b)). Some examples of adverse impact on a DoD mission are as follows:

- (1) Endangerment of personnel or property.
- (2) Monetary loss.
- (3) Denigration of program or personnel integrity.
- (4) Compromise of the procurement process.
- (5) Reduction or loss of mission readiness.

h. Ensure training materials are developed on fraud and corruption in the procurement process, and that all procurement and procurement-related training includes a period of such instruction appropriate to the duration and nature of the training.

i. Establish procedures enabling the centralized organization to ensure that safety and readiness issues are examined and appropriately dealt with for all cases in which a notice is required under paragraph E.2.i., below. The minimum procedures to be followed by the centralized organization are in enclosure 3.

j. Ensure that appropriate command, procurement, and investigative organizations are provided sufficient information to determine if further inquiry is warranted on their part to prevent reoccurrence and detect other possible fraud within their activity.

2. The *Secretaries of the Military Departments* and the *Inspector General, Department of Defense (IG, DoD)*, or their designees, shall establish procedures that ensure that their respective criminal investigative organizations will:

a. Notify, in writing, the centralized organization for the affected DoD Component of the start of all significant investigations involving fraud or corruption that are related to procurement activities. Initial notification shall include the following elements:

- (1) Case title.
- (2) Case control number.
- (3) Investigative agency and office of primary responsibility.
- (4) Date opened.
- (5) Predication.
- (6) Suspected offense(s).

b. Notify expeditiously the Defense Investigative Service (DIS) of any investigations that develop evidence that would impact on DoD-cleared industrial facilities or personnel.

c. Discuss regularly with the centralized organization such issues as the current status of significant investigations and their coordination with prosecutive authorities. If the DoD criminal investigative organization has prepared any documents summarizing the current status of the investigation, such documents shall be provided to the central-

ized organization. Completed reports of significant investigations also should be provided to the centralized organization.

d. Provide to the appropriate procurement officials, commanders, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records, documents, or other evidence of fraud or corruption related to procurement activities. Such information shall be provided in a timely manner to enable the suspension and debarment authority to initiate suspension and debarment action within 30 days of an indictment or conviction.

e. Provide expeditiously to prosecutive authorities the information regarding any adverse impact on a DoD mission, that is gathered under paragraph E.1.g., above, for the purpose of enhancing the prosecutability of a case. Such information also should be used in preparing a victim impact statement for use in sentencing proceedings as provided for in Public Law 97-291.

f. Gather, at the earliest practical point in the investigation, without reliance on grand jury subpoenas whenever possible, relevant information concerning responsible individuals, the organizational structure, finances, and contract history of DoD contractors under investigation for fraud or corruption related to procurement activities, to facilitate the criminal investigation as well as any civil, administrative, or contractual actions or remedies that may be taken. Some available sources of such information are listed in enclosure 2.

g. Provide timely notice to other cognizant DoD criminal investigative organizations of evidence of fraud by a contractor, subcontractor, or employees of either, on current or past contracts with, or affecting, other DoD Components.

h. Ascertain the impact upon any ongoing investigation or prosecution of civil, contractual, and administrative actions being considered and advise the appropriate centralized organization of any adverse impact.

i. Obtain a DD 350 report in every investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

j. Obtain a DD 350 report in all significant fraud investigations, as defined in subsection C.2. above, whether or not the case involved defective products or product substitution. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

3. The *Inspector General, Department of Defense (IG, DoD)*, shall:

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a. Develop training materials relating to fraud and corruption in procurement related activities which shall be utilized in all procurement related training in conjunction with training materials developed by the DoD Components. (See paragraph E.1.h., above.)

b. Establish procedures for providing to the DoD criminal investigative organizations, through the Office of the Assistant Inspector General for Auditing (OAIG–AUD), reports of data contained in the Individual Procurement Action Report (DD Form 350) System.

*F. Procedures*

Transmissions of information by DoD criminal investigative organizations required by subsection E.2., above, shall be made as expeditiously as possible, consistent with efforts not to compromise any ongoing criminal investigation. The transmission of the information may be delayed when, in the judgment of the head of the DoD criminal investigative organization, failure to delay would compromise the success of any investigation or prosecution. The prosecutive authorities dealing with the investigation shall be consulted, when appropriate, in making such determinations.

*G. Effective Date and Implementation*

This Directive is effective immediately. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 120 days.

Donald J. Atwood,

*Deputy Secretary of Defense.*

Enclosures—3

1. Civil Contractual and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

2. Sources of Information Relating to Government Contractors

3. Actions to be Taken in Product Substitution Investigations

**Civil, Contractual, and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud**

*A. Civil*

*1. Statutory*

- a. False Claims Act (31 USC 3729 et seq.).
- b. Anti-Kickback Act (41 USC 51 et seq.).
- c. Voiding Contracts (18 USC 218).

d. Truth in Negotiations Act (10 USC 2306(f)).

e. Fraudulent Claims-Contract Disputes Act (41 USC 604)

*2. Nonstatutory*

- a. Breach of contract.
- b. Breach of warranty.
- c. Money paid under mistake of fact.
- d. Unjust enrichment.
- e. Fraud and/or Deceit.
- f. Conversion.
- g. Rescission and/or Cancellation.
- h. Reformation.
- i. Enforcement of performance bond/guarantee agreement.

*3. Contractual*

- a. Termination of contract for default.
- b. Termination of contract for convenience of Government.
- c. Termination for default and exemplary damages under the gratuities clause.
- d. Rescission of contract.
- e. Contract warranties.
- f. Withholding of payments to contractor.
- g. Offset of payments due to contractor from other contracts.
- h. Price reduction.
- i. Correction of defects (or cost of correction).
- j. Refusal to accept nonconforming goods.
- k. Revocation of acceptance.
- l. Denial of claims submitted by contractors.
- m. Disallowance of contract costs.
- n. Removal of the contractor from automated solicitation or payment system.

*4. Administrative*

- a. Change in contracting forms and procedures.
- b. Removal or reassignment of Government personnel.
- c. Review of contract administration and payment controls.
- d. Revocation of warrant contracting officer.
- e. Suspension of contractor and contractor employees.
- f. Debarment of contractor and contractor employees.
- g. Revocation of facility security clearances.
- h. Nonaward of contract based upon a finding of contractor nonresponsibility.
- i. Voluntary refunds.

**SOURCES OF INFORMATION RELATING TO GOVERNMENT CONTRACTORS**

Type of information	Possible source
Location, dollar value, type, and number of current contracts with the Department of Defense.	a. DD Form 350 Report. <sup>1</sup> b. Defense Logistics Agency's (DLA) "Contract Administration Defense Logistics Agency's (DLA) Contract Administration Report (CAR Report) on contracts DLA administers.

## SOURCES OF INFORMATION RELATING TO GOVERNMENT CONTRACTORS—Continued

Type of information	Possible source
2. Financial status of corporation, history of corporation, owners, and officers.	a. Dunn and Bradstreet Reports. b. Corporate filings with local secretaries of the State, or corporate recorders. c. Securities and Exchange Commission (public corporations). d. Small Business Administration (SBA) (small businesses). e. General Accounting Office (bid protests, and contractors indebted to the Government). f. Armed Services Board of Contract Appeals (ASBCA) or court litigation. g. List of Contractors Indebted to the United States (maintained, published and distributed by the U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249).
3. Security clearance background information on facility and officers.	a. Defense Investigative Service.
4. Performance history of contractor .....	a. Local contracting officers. b. Defense Contract Administration Service preaward surveys. c. SBA Certificate of Competency records. DLA Automated Criminal Case Management System. (Available through field offices of the DLA Counsel's office.) Field offices of the DLA Counsel's office.
5. Name, location, offense alleged, and previous investigative efforts involving DLA-awarded or DLA-administered contracts.	
6. Bid protests, litigation, and bankruptcy involving DLA-awarded or DLA-administered contracts.	

<sup>1</sup> A determination as to the contract history of any DoD contractor with contracts in excess of \$25,000 annually can be made through a review of the "Individual Procurement Action Report" (DD Form 350) system, as prescribed by Subpart 4.6 of the DoD FAR Supplement, DoD Instruction 4105.61, and DoD 4105.61-M (references (c), (d), and (e)).

ACTIONS TO BE TAKEN IN PRODUCT  
SUBSTITUTION INVESTIGATIONS

A. The centralized organization, in all cases involving allegations of product substitution in which a **SERIOUS HAZARD** to health, safety, or operational readiness is indicated shall:

1. Review the notice of the case immediately after receiving it from the Defense criminal investigative organization. Review the notice to determine any potential safety or readiness issues indicated by the suspected fraud.

2. Notify all appropriate safety, procurement, and program officials of the existence of the case.

3. Obtain a complete assessment from safety, procurement, and program officials of the adverse impact of the fraud on DoD programs and operations.

4. Ensure that the DoD Component provides the Defense criminal investigative organization with full testing support to completely identify the defective nature of the substituted products. Costs associated with the testing shall be assumed by the appropriate procurement program.

5. Prepare a comprehensive impact statement describing the adverse impact of the fraud on DoD programs for use in any criminal, civil, or contractual action related to the case.

B. In all cases involving allegations of product substitution that affect more than one DoD Component, that centralized organizations of the affected DoD Components shall identify a lead Agency. The lead centralized organization shall ensure that information on the fraud is provided to the cen-

tralized organization of all other affected DoD Components. The lead centralized organization shall ensure compliance with the requirements of section A., above. The lead centralized organization shall then be responsible for preparing a comprehensive "Victim Impact Statement" as required by paragraph E.1.g. of this Directive.

C. In all cases involving allegations of product substitution, the Defense Criminal Investigative Organization shall:

1. Immediately notify the appropriate centralized organization of the beginning of the case.

2. Continue to provide to the centralized organization any information developed during the course of the investigation that indicates substituted products have been, or might be, provided to the Department of Defense.

3. Ensure that any request for testing of substituted products is provided to the centralized organization.

APPENDIX E TO PART 516—DEPARTMENT  
OF DEFENSE DIRECTIVE 5505.5, IM-  
PLEMENTATION OF THE PROGRAM  
FRAUD CIVIL REMEDIES ACT

DOD Directive 5505.5 is contained in 32 CFR part 277.

## APPENDIX F TO PART 516—GLOSSARY

*Abbreviations*

AAFES: Army and Air Force Exchange Service  
AMEDD: Army Medical Department

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AFARS: Army Federal Acquisition Regulation Supplement  
ASBCA: Armed Services Board of Contract Appeals  
AUSA: Assistant United States Attorney  
CFR: Code of Federal Regulations  
COE: United States Army Corps of Engineers  
DA: Department of the Army  
DFARS: Defense Federal Acquisition Regulation Supplement  
DOD: Department of Defense  
DOJ: Department of Justice. In this regulation, reference to DOJ means either United States Attorneys' Offices or The (main) Department of Justice in Washington, DC  
DCIS: Defense Criminal Investigative Service  
e.g.: An abbreviation for *exempli gratia*, meaning "for example"  
*et seq.*: An abbreviation for *et sequentes*, meaning "and the following"  
FAR: Federal Acquisition Regulation  
FAX: Facsimile Transmission  
FBI: Federal Bureau of Investigation  
Fed. R. Civ. P.: Federal Rules of Civil Procedure  
Fed. R. Crim. P.: Federal Rules of Criminal Procedure  
FOIA: Freedom of Information Act  
GAO: General Accounting Office  
HQDA: Headquarters, Department of the Army  
i.e.: An abbreviation for *id est*, meaning "that is"  
IG: Inspector General  
JA: Judge Advocate  
MACOM: Major Command  
MSPB: Merit Systems Protection Board  
NAF: Nonappropriated Fund  
OTJAG: Office of The Judge Advocate General  
OSC: Office of Special Counsel  
PFA: Procurement Fraud Advisor  
PFCRA: Program Fraud Civil Remedies Act  
PFD: Procurement Fraud Division  
PFI: Procurement Fraud or Irregularities  
RJA: Recovery Judge Advocate  
SAUSA: Special Assistant U.S. Attorney  
SJA: Staff Judge Advocate  
TDY: temporary Duty  
TJAG: The Judge Advocate General  
UCMJ: Uniform Code of Military Justice  
USACIDC: U.S. Army Criminal Investigation Command  
USALSA: U.S. Army Legal Services Agency  
USARCS: U.S. Army Claims Service  
USATDS: U.S. Army Trial Defense Service  
USMA: United States Military Academy  
U.S.C.: United States Code

Terms

Active Duty

Full-time duty in the active military service of the United States. Includes: full-time training duty; annual training duty; active

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duty for training; attendance, while in the active military service, at a school designated as a Service School by law or by the Secretary of the military department concerned; and, attendance, while in the active military service, at advanced civil schooling and training with industry. It does not include full-time National Guard duty under Title 32, United States Code.

Army Activities

Activities of or under the control of the Army, one of its instrumentalities, or the Army National Guard, including activities for which the Army has been designated the administrative agency, and those designated activities located in an area in which the Army has been assigned single service claims responsibility by DOD directive.

Army Property

Real or personal property of the United States or its instrumentalities and, if the United States is responsible therefore, real or personal property of a foreign government which is in the possession or control of the Army, one of its instrumentalities, or the Army National Guard, including property of an activity for which the Army has been designated the administrative agency, and property located in an area in which the Army has been assigned single service claims responsibility.

Centralized Organization

That organization of a DOD component responsible for coordinating and monitoring of criminal, civil, contractual, and administrative remedies relating to contract fraud. For DOD components other than the Army, the Centralized organizations are as follows: the Office of General Counsel, Department of the Air Force; the Office of the Inspector General, Department of the Navy; and the Office of General Counsel, Defense Logistics Agency.

Claim

The Government's right to recover money or property from any individual, partnership, association, corporation, governmental body, or other legal entity (foreign and domestic) except an instrumentality of the United States. A claim against several joint debtors or tortfeasors arising from a single transaction or incident will be considered one claim.

Claims Officer

A commissioned officer, warrant officer, or qualified civilian employee designated by the responsible commander and trained or experienced in the conduct of investigations and the processing of claims.

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### Corruption

Practices that include, but are not limited to, solicitation, offer, payment, or acceptance of bribes or gratuities; kickbacks; conflicts of interest; or unauthorized disclosure of official information related to procurement matters.

### Counsel for Consultation

An attorney, provided by DA at no expense to the military member or civilian employee, who will provide legal advice to the witness concerning the authority of OSC, the nature of an OSC interview and their individual rights and obligations. The counsel may accompany the witness to the interview and advise the witness during the interview. No attorney-client relationship is established in this procedure.

### Counsel for Representation

An attorney, provided by DA at no expense to the military member or civilian employee, who will act as the individual's lawyer in all contacts with the MSPB and the OSC during the pendency of the OSC investigation and any subsequent OSC initiated action before the MSPB. An attorney-client relationship will be established between the individual and counsel for representation.

### DA Personnel

DA personnel includes the following:

- a. Military and civilian personnel of the Active Army and The U.S. Army Reserve.
- b. Soldiers of the Army National Guard of the United States (Title 10, U.S.C.) and, when specified by statute or where a Federal interest is involved, soldiers in the Army National Guard (Title 32, U.S.C.). It also includes technicians under 32 U.S.C. 709(a)(d).
- c. USMA cadets.
- d. Nonappropriated fund employees.
- e. Foreign nationals who perform services for DA overseas.
- f. Other individuals hired by or for the Army.

### Debarment

Administrative action taken by a debarring authority to exclude a contractor from Government contracting and Government-approved subcontracting for a specified period.

### Deciding Official (Chapter 7)

SJA, legal adviser, or Litigation Division attorney who makes the final determination concerning release of official information.

### DOD Criminal Investigation Organizations

Refers to the USACIDC; the Naval Investigative Service; the U.S. Air Force Office of Special Investigations; and the Defense

Criminal Investigative Service, Office of the Inspector General, DOD.

### Fraud

Any intentional deception of DOD (including attempts and conspiracies to effect such deception) for the purpose of inducing DOD action or reliance on that deception. Such practices include, but are not limited to, the following: bid-rigging; making or submitting false statements; submission of false claims; use of false weights or measures; submission of false testing certificates; adulterating or substituting materials; or conspiring to use any of these devices.

### Improper or Illegal Conduct

- a. A violation of any law, rule, or regulation in connection with Government misconduct; or
- b. Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

### Information Exempt From Release To The Public

Those categories of information which may be withheld from the public under one or more provisions of law.

### Judge Advocate

An officer so designated (AR 27-1).

### Legal Adviser

A civilian attorney who is the principal legal adviser to the commander or operating head of any Army command or agency.

### Litigation

Legal action or process involving civil proceedings, i.e., noncriminal.

### Litigation in Which The United States Has an Interest

- a. A suit in which the United States or one of its agencies or instrumentalities has been, or probably will be, named as a party.
- b. A suit against DA personnel and arises out of the individual's performance of official duties.
- c. A suit concerning an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation.
- d. A suit involving administrative proceedings before Federal, state, municipal, or foreign tribunals or regulatory bodies that may have a financial impact upon the Army.
- e. A suit affecting Army operations or which might require, limit, or interfere with official action.
- f. A suit in which the United States has a financial interest in the plaintiff's recovery.

g. Foreign litigation in which the United States is bound by treaty or agreement to ensure attendance by military personnel or civilian employees.

#### Medical Care

Includes hospitalization, outpatient treatment, dental care, nursing service, drugs, and other adjuncts such as prostheses and medical appliances furnished by or at the expense of the United States.

#### Misdemeanor

An offense for which the maximum penalty does not exceed imprisonment for 1 year. Misdemeanors include those offenses categorized as petty offenses (18 USC §3559).

#### Official Information

All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.

#### Operating Forces

Those forces whose primary missions are to participate in combat and the integral supporting elements thereof. Within DA, the operating forces consist of tactical units organized to conform to tables of organization and equipment (TOE).

#### Personnel Action

These include—

- a. Appointment.
- b. Promotion.
- c. Adverse action under 5 U.S.C. 7501 et seq. or other disciplinary or corrective action.
- d. Detail, transfer, or reassignment.
- e. Reinstatement.
- f. Restoration.
- g. Reemployment.
- h. Performance evaluation under 5 U.S.C. 4301 et seq.
- i. Decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.
- j. Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

#### Private Litigation

Litigation other than that in which the United States has an interest.

#### Process

The legal document that compels a defendant in an action to appear in court; e.g., in a civil case a summons or subpoena, or in a criminal case, a warrant for arrest, subpoena or summons.

#### Prohibited Personnel Practice

Action taken, or the failure to take action, by a person who has authority to take, direct others to take, recommend, or approve any personnel action—

a. That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws.

b. To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

c. To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

d. To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

e. To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

f. To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

g. To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee, if the position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as an official.

h. To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower, as defined below.

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i. To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

j. To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

k. To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

### Prosecutive Authorities

These include—

- a. A U.S. Attorney;
- b. A prosecuting attorney of a State or other political subdivision when the U.S. Attorney has declined to exercise jurisdiction over a particular case or class of cases; and
- c. An SJA of a general court-martial convening authority considering taking action against a person subject to the UCMJ.

### Recovery JA

A JA or legal adviser responsible for assertion and collection of claims in favor of the United States for property claims and medical expenses.

### Significant Case of Fraud and Corruption

A procurement fraud case involving an alleged loss of \$100,000 or more; all corruption cases related to procurement that involve bribery, gratuities, or conflicts of interest; any defective products or product substitution in which a serious hazard to health, safety or operational readiness is indicated, regardless of loss value; and, any procurement fraud case that has received or is expected to receive significant media coverage.

### Staff Judge Advocate

An officer so designated (AR 27-1). The SJA of an installation, a command or agency reporting directly to HQDA, or of a major subordinate command of the U.S. Army Materiel Command, and the senior Army JA assigned to a joint or unified command.

### Subpoena

A process to cause a witness to appear and give testimony, e.g., at a trial, hearing, or deposition.

### Suspension

Administrative action taken by a suspending authority to temporarily exclude a contractor from Government contracting and Government-approved subcontracting.

### Suspension and Debarment Authorities

Officials designated in DFARS, section 9.403, as the authorized representative of the Secretary concerned.

### Tortfeasor

A wrongdoer; one who commits a tort.

## APPENDIX G TO PART 516—FIGURES

This appendix contains figures cited or quoted throughout the text of this part.

### *Figure C-1. Sample Answer to Judicial Complaint, With Attached Certificate of Service*

In the United States District Court for the Southern District of Texas Corpus Christi Division, No. C-90-100

John Doe, Plaintiff v. Togo D. West, Jr., Secretary of the Army, Department of the Army, Defendant.

### First Affirmative Defense

The Complaint is barred by laches.

Figure C-3. Sample Answer to Judicial Complaint, with attached Certificate of Service. This is intended to be used as a guide in preparing a draft Answer as part of a Litigation Report.

### Answer

For its answer to the complaint, defendant admits, denies and alleges as follows:

1. Admits.
2. Denies.
3. Denies.
4. The allegations contained in paragraph 4 are conclusions of law to which no response is required; to the extent they may be deemed allegations of fact, they are denied.
5. Denies the allegations contained in the first sentence of paragraph 5; admits the allegations contained in the second sentence of paragraph 5; denies the remainder of the allegations in paragraph 5.
6. Denies the allegations in paragraph 6 for lack of knowledge or information sufficient to form a belief as to their truth.
7. Denies each allegation in the complaint not specifically admitted or otherwise qualified.

### Prayer for Relief

The remainder of plaintiff's Complaint contains his prayer for relief, to which no answer is required. Insofar as an answer is required, denies that plaintiff is entitled to any relief whatsoever.

Defendant respectfully prays that the Court dismiss plaintiff's Complaint and award to defendant costs and such further relief as the Court deems proper.

Respectfully submitted,  
Ronald M. Ford,  
*United States Attorney.*

Roy A. Andersen,  
Assistant United States Attorney, 606 N.  
Carancua, Corpus Christi, Texas 78476, (512)  
884-3454.

Captain Christopher N. Jones,  
Department of the Army, Office of the Judge,  
Advocate General, 901 N. Stuart St., Suite  
400, Arlington, Virginia 22203-1837, (703)  
696-1666.

#### Certificate of Service

I hereby certify that a true and correct copy of Defendant's Answer has been placed in the mail, postage prepaid, this \_\_\_\_ day of \_\_\_\_\_, 1991, addressed to plaintiff's counsel as follows: Mr. Eugene Henderson, 777 Fourth Street, Corpus Christi, TX 78888.

Roy A. Andersen,  
Assistant United States Attorney.

#### SAMPLE DA FORM 4

Figure C-3. Unsworn Declaration Under Penalty of Perjury Executed Within the United States

#### Declaration Under Penalty of Perjury

I am Private Paul Jones, currently assigned to Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina. I have personal knowledge of the following matters.

On the evening of 3 June 1970, I was present at the company party at Lake Popolopen when the accident occurred. I saw a bright, full moon that evening.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. §1746).

Executed on: \_\_\_\_\_  
Paul Jones,  
Private, U.S. Army.

Figure D-1. Format for a Request for a Representation Using an Unsworn Declaration Under Penalty of Perjury Executed Within the United States

#### Request for Representation

I request that the Attorney General of the United States, or his agent, designate counsel to defend me in my official and individual capacities in the case of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina. I have read the complaint filed in this case and I declare that all my actions were performed in my official capacity, within the scope of my official duties, and in a good faith belief that my actions conformed to the law. I am not aware of any pending related criminal investigation.

I understand the following: if my request for representation is approved, I will be represented by a U.S. Department of Justice attorney; that the United States is not required to pay any final adverse money judg-

ment rendered against me personally, although I can request indemnification; that I am entitled to retain private counsel at my own expense; and, that the Army expresses no opinion whether I should or should not retain private counsel.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. §1746).

Executed on: \_\_\_\_\_  
Paul Jones,  
Private, U.S. Army.

Figure D-2. Format for Scope of Employment Statement Using an Unsworn Declaration Under Penalty of Perjury Executed Outside the United States

#### Declaration

I am currently the Commander of HHC, 6th Armored Division, Bad Vilbel, Germany. I have read the allegations concerning Private Paul Jones in the complaint of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina.

At all times relevant to the complaint, I was Private Jones' company commander. His actions relevant to this case were performed within the scope of his official duties as Assistant Charge of Quarters, Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 U.S.C. §1746).

Executed on: \_\_\_\_\_  
John Smith,  
Captain, Infantry.

Figure D-3. Format for Contractor Request for Representation

#### Request for Representation

I am the President of the XYZ Corporation. I request the Attorney General of the United States designate counsel to defend me and my company in *Doe v. XYZ, Inc.*, now pending in the U.S. District Court for the Eastern District of North Carolina.

I understand that the assumption by the Attorney General of the defense of this case does not alter or increase the obligations of the United States under United States Contract No. WP-70-660415.

I further agree that such representation will not be construed as waiver or estoppel to assert any rights which any interested party may have under said contract.

Executed on: \_\_\_\_\_  
D.D. Tango,  
President, XYZ, Inc.

## Department of the Army, DoD

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### Figure G-1. Sample "Touhy" Compliance Letter

Department of the Army, Office of the Staff  
Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,  
*Attorney At Law, 105 Hay Street, Whynot, ND 84167*

Dear Mr. Taylor: We have learned that you subpoenaed Captain Roberta Selby to testify at a deposition in the case *Kramer v. Kramer*, currently filed in state court, and that you directed her to bring her legal assistance file concerning her client, SSG Kramer.

Under 32 CFR §§97.6(c), 516.35, and 516.40, the Army must authorize the appearance of its personnel or the production of official documents in private litigation. In this case, the Army cannot authorize Captain Selby to appear or produce the requested file absent the following:

You must request in writing her appearance and the production of the file in accordance with Department of Defense directives, 32 CFR §97.6(c), and Army regulations, 32 CFR §§516-34—516.40. The request must include the nature of the proceeding, 32 CFR §516.34(b), and the nature and relevance of the official information sought. *Id.* §516.35(d). We cannot act on your request until we receive the required information. *See, for example, United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard*, 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen*, 554 F.2d 398 (10th Cir. 1977).

To overcome Federal statutory restrictions on the disclosure of the requested file imposed by the Privacy Act, 5 U.S.C. §552a, you must provide either a written release authorization signed by the individual to whom the file pertains (that is, SSG Kramer) or a court ordered release signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See, for example, Doe v. DiGenova*, 779 F.2d 74 (DC Cir. 1985).

In this case, because of the attorney-client relationship between Captain Selby and SSG Kramer, you must produce a written waiver of the attorney-client privilege from SSG Kramer. Because the privilege may protect both documents and testimony, Captain Selby may not divulge such information without SSG Kramer's consent. *See, for example, Rule of Professional Conduct for Army Lawyers* 1.6(a).

In addition to the above requirements, Captain Selby's supervisor must approve her absence from duty. *See* 32 CFR §516.43. In this regard, we suggest you take the deposition at Fort Smith. In any event, however, you or your client must pay all travel expenses, as this is purely private litigation and witness' appearance must be at no expense to the United States. *See id.* §516.48(c).

Finally, if Captain Selby does appear as a witness, she may only give factual testimony. She may not testify as an opinion or expert witness. This limitation is based on Department of Defense and Army policy that generally prohibits Government employees from appearing as expert witnesses in private litigation. *See id.* §§97.6(e), 516.42.

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. So that the Army can adequately protect its interests in this matter, I request that you respond to this letter by 27 April 1993. If you have any questions, please call CPT Taylor at 919-882-4500.

Sincerely,  
Robert V. Jackansi,  
*Major, JA, Chief, Administrative Law.*

### Figure G-2. Sample Fact Witness Approval Letter

Department of the Army, Office of the Staff  
Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,  
*Attorney At Law, 105 Hay Street, Whynot, ND 84167*

Dear Mr. Taylor: This letter responds to your request to interview and depose Captain Buzz Sawyer as a witness in *Morgan v. Jones*. Subject to the following conditions, your request is approved.

This grant of authority is limited to factual testimony only. Captain Sawyer may not testify as an expert witness. This limitation is based on Army policy prohibiting Government employees from appearing as expert witnesses in private litigation. *See* 32 CFR §516.42. Captain Sawyer may not provide official information that is classified, privileged, or otherwise protected from public disclosure.

The decision whether to testify in private litigation is within the discretion of the prospective witness. This authorization is also subject to the approval of the witness' supervisors to be absent during the period involved. Finally, because this is private litigation, the witness' participation must be at no expense to the United States. *See* 32 CFR §516.48.

If you have any questions, please call CPT Taylor at 919-882-4500.

Sincerely,  
Robert V. Jackansi,  
*Major, JA, Chief, Administrative Law*

### Figure G-3. Sample Expert Witness Denial Letter

Department of the Army, Office of the Staff  
Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,

*Attorney At Law, 105 Hay Street, Whynot, ND 84167*

Dear Mr. Taylor: This responds to your request for Mr. Charles Montrose to appear as an expert witness in private litigation: *Smithers v. ABC Video*. For the following reasons, the request is denied.

Army Regulation 27-40 forbids Army personnel from providing expert testimony in private litigation, with or without compensation, except under the most extraordinary circumstances. See 32 CFR §§97.6(e), 516.42. Several reasons support the exercise of strict control over such witness appearances.

The Army policy is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army's mission and the Federal taxpayer.

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the extraordinary circumstances necessary to justify the requested witness' expert testimony. You have demonstrated no exceptional need or unique circumstances that would warrant (his or her) appearance. The expert testimony desired can be secured from non-Army sources. Consequently, we are unable to grant you an exception to the Army's policy.

If you have any questions, please call me or CPT Taylor at 919-882-4500.

Sincerely,  
Robert V. Jackansi,  
Major, JA, Chief, Administrative Law.

*Figure G-4. Sample of Doctor Approval Letter*

Department of the Army, Office of the Staff Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,  
*Attorney At Law, 105 Hay Street, Whynot, ND 84167*

Dear Mr. Taylor: This responds to your request to depose Dr. (MAJ) J. McDonald, Fort

Smith Medical Treatment Facility. Pursuant to 32 CFR §§516.33-516.49, you may depose him subject to the following conditions:

He may testify as to his treatment of his patient, Sergeant Rock, as to related laboratory tests he may have conducted, or other actions he took in the regular course of his duties.

He must limit his testimony to factual matters such as his observations of the patient or other operative facts, the treatment prescribed or corrective action taken, course of recovery or steps required for treatment of injuries suffered, or contemplated future treatment.

His testimony may not extend to hypothetical questions or to a prognosis. He may not testify as an "expert." This limitation is based on Department of Defense and Army policy prohibiting present or former military personnel and Army civilian employees from providing opinion or expert testimony concerning official information, subjects, or activities in private litigation. See 32 CFR §§97.6(e), 516.42.

The witnesses may not provide official information that is classified, privileged, or otherwise protected from public disclosure. To protect the Army's interests, CPT Taylor or another Army attorney will be present during the depositions.

To overcome restrictions imposed by the Privacy Act, 5 U.S.C. §552a, Dr. McDonald may not discuss matters derived from the patient's medical records absent the patient's written consent or a court order signed by a judge. A subpoena issued by someone other than a judge or magistrate is insufficient. See *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985); *Stiles v. Atlanta Gas Light Co.*, 453 F. Supp. 798 (N.D. Ga. 1978).

The decision whether to testify in private litigation is within the discretion of the witness, subject to the approval of his supervisors to be absent during the period involved.

Finally, because this is private litigation, the witnesses' participation must be at no expense to the United States. See 32 CFR §516.48.

If you have any questions, please call me or CPT Taylor at 919-882-4500.

Sincerely,  
Robert V. Jackansi,  
Major, JA, Chief, Administrative Law.

*Figure H-1. Procurement Fraud Indicators*

Procurement Fraud Indicators

1. During the identification of the government and services.
  - a. Need determinations for items currently scheduled for disposal or reprourement, or which have predetermined reorder levels.
  - b. Excessive purchase of "expendables" such as drugs or auto parts.
  - c. Inadequate or vague need assessment.

- d. Frequent changes in the need assessment or determination.
- e. Mandatory stock levels and inventory requirements appear excessive.
- f. Items appear to be unnecessarily declared excess or sold as surplus, while same items are being reprocured.
- g. It appears that an item or service is being purchased more as a result of aggressive marketing efforts rather than in response to a valid requirement.
- h. Need determination appears to be unnecessarily tailored in ways that can only be met by certain contractors.
- i. Items and services are continually obtained from the same source due to an unwarranted lack of effort to develop second sources.
- 2. During the development of the statements of work and specifications.
  - a. Statements of work and specifications appear to be intentionally written to fit the products or capabilities of a single contractor.
  - b. Statements of work, specifications, or sole source justifications developed by or in consultation with a preferred contractor.
  - c. Information concerning requirements and pending contracts is released only to preferred contractors.
  - d. Allowing companies and industry personnel who participated in the preparation of bid packages to perform on subsequent contracts in either a prime or subcontractor capacity.
  - e. Release of information by firms or personnel participating in design or engineering to companies competing for prime contract.
  - f. Prequalification standards or specifications appear designed to exclude otherwise qualified contractors or their productions.
  - g. Requirements appear split up to allow for rotating bids, giving each contractor his or her "fair share."
  - h. Requirements appear split up to meet small purchase requirements (that is, \$25,000) or to avoid higher levels of approval that would be otherwise required.
  - i. Bid specifications or statement of work appear inconsistent with the items described in the general requirements.
  - j. Specifications appear so vague that reasonable comparisons of estimate would be difficult.
  - k. Specifications appear inconsistent with previous procurements of similar items of services.
- 3. During the presolicitation phase.
  - a. Sole source justifications appear unnecessary or poorly supported.
  - b. Statements justifying sole source or negotiated procurements appear inadequate or incredible.
  - c. Solicitation documents appear to contain unnecessary requirements which tend to restrict competition.

- d. Contractors or their representatives appear to have received advanced information related to the proposed procurement on a preferential basis.
- 4. During the solicitation phase.
  - a. Procurement appears to be processed so as to exclude or impede certain contractors.
  - b. The time for submission of bids appears to be unnecessarily limited so that only those with advance information have adequate time to prepare bids or proposals.
  - c. It appears that information concerning the procurement has been revealed only to certain contractors, without being revealed to all prospective competitors.
  - d. Bidders conferences are conducted in a way that apparently invites bid rigging, price fixing, or other improper collusion between contractors.
  - e. There is an apparent intentional failure to fairly publish notice of the solicitation.
  - f. Solicitation appears vague as to the details such as time, place and manner, of submitting acceptable bids.
  - g. There is evidence of improper communications or social contract between contractors and government personnel.
  - h. Controls over the number and destination of bid packages sent to interested bidders appear inadequate.
  - i. Indications that government personnel or their families may own stock or have some other financial interest in either a contractor or subcontractor.
  - j. Indications that government personnel are discussing possible employment for themselves or a family member with a contractor or subcontractor or indications that a proposal for future employment from a contractor or subcontractor to a government employee or his or her family members has not been firmly rejected.
  - k. Indications that any contractor has received special assistance in preparation of his or her bid or proposal.
  - l. It appears that a contract is given an expressed or implied reference to a specific subcontractor.
  - m. Failure to amend solicitation to reflect necessary changes or modifications.
- 5. During the submission of bids and proposals.
  - a. Improper acceptance of a late bid.
  - b. Documents, such as receipts, appear falsified to obtain acceptance of a late bid.
  - c. Improperly attempting to change a bid after other bidders prices are known.
  - d. Indications that mistakes have been deliberately planted in a bid to support correction after bid opening.
  - e. Withdrawal by a low bidder who may later become a subcontractor to a higher bidder who gets the contract.
  - f. Apparent collusion or bid rigging among the bidders.
  - g. Bidders apparently revealing their prices to each other.

- h. Required contractor certifications appear falsified.
- i. Information concerning contractor's qualifications, finances, and capabilities appears falsified.
- 6. During the evaluation of bids and proposals.
  - a. Deliberately losing or discarding bids of certain contractors.
  - b. Improperly disqualifying the bids or proposals of certain contractors.
  - c. Accepting apparently nonresponsive bids from preferred contractors.
  - d. Unusual or unnecessary contacts between government personnel and contractors during solicitation, evaluation, and negotiation.
  - e. Any apparently unauthorized release of procurement information to a contractor or to non-government personnel.
  - f. Any apparent favoritism in the evaluation of the bid or proposal of a particular contractor.
  - g. Apparent bias in the evaluation criteria or in the attitude or actions of the members of the evaluation panel.
- 7. During contract formation and administration.
  - a. Defective pricing by the contractor usually associated with submitting false cost and pricing data under the Truth in Negotiation Act.
  - b. Cost/Labor mischarging.
  - c. Product substitution.
  - d. Progress payment fraud. For more details on these subjects see DA PAM 27-153, Contract Law, paragraph 23-5.

*Figure H-2. Guide for Preparing Remedies Plan*

Guide for Preparing a Remedies Plan

(Date of Plan)

Section I (Administrative Data)

- A. Subject of Allegation.
- B. Principal Investigative Agency.
- C. Investigative Agency File Number.
- D. Subject's Location.
- E. Location Where Offense Took Place.
- F. Responsible Action Commander.
- G. Responsible MACOM.
- H. Contract Administrative Data (If Applicable):
  - 1. Contract Number.
  - 2. Type of Contract.
  - 3. Dollar Amount of Contract.
  - 4. Period of Contract.
- I. Principal Case Agent (Name and Telephone Number).
- J. Civilian Prosecutor (If Applicable) (Name, Address, and Telephone Number).
- K. Is Grand Jury Investigating This Matter? If So, Where is Grand Jury Located?

- L. Audit Agency Involved (If Applicable). Name and Telephone Number of Principal Auditor.
- M. Suspense Date for Update of This Plan.

Section II (Summary of Allegations and Investigative Results to Date)

(Provide sufficient detail for reviewers of the plan to evaluate the appropriateness of the planned remedies. If information is "close-hold" or if grand jury secrecy applies, so state.)

Section III (Adverse Impact Statement)

(Describe any adverse impact on the DA/DOD mission. Adverse impact is described in DOD Directive 7050.5, paragraph E.1.g. Identify impact as actual or potential. Describe the impact in terms of monetary loss, endangerment to personnel or property, mission readiness, etc. This information should be considered in formulating your remedies as described below and provided to prosecutors for their use in prosecution of the offenses.)

Section IV (Remedies Taken and/or Being Pursued)

A. Criminal Sanctions. (As a minimum, address the following: Are criminal sanctions appropriate? If so, which ones? If not, why not? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? What actions have been taken or are intended? If and when action is complete, describe action and final results of the action. Other pertinent comments should be included.)

B. Civil Remedies. (As a minimum address the following: Which civil remedies are appropriate? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? How, when, where and by whom are the appropriate civil remedies implemented? If and when action is completed, describe action and final results. Other pertinent comments should be included.)

C. Contractual/Administrative Remedies. (As a minimum, address the following: Are contractual and administrative remedies appropriate? If so, which ones? If not, Why? If contractual or administrative remedies are considered appropriate, describe how, when, and by whom the remedies are implemented. If and when action is completed, describe action and results of the action. Other pertinent comments should be included.)

D. Restrictions on Remedies Action. (Comment as to why obvious remedies are not being pursued. For example, the U.S. Attorney requests suspension action held in abeyance pending criminal action.)

## Department of the Army, DoD

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### Section V (Miscellaneous Comments/ Information)

#### Section VI (Remedies Plan Participants)

(Record the name, grade, organization, and telephone number of all Remedies Plan participants.)

#### Section VII (MACOM Coordination Comments)

(Record the name, grade, office symbol, and telephone number of all MACOM officials providing coordination comments; record the date when comments are submitted and append to the Remedies Plan the signed comments provided.)

#### MACOM Focal Point

(Record the name, grade, office symbol, and telephone number of the MACOM focal point.)

#### Section VIII (Coordination/Comments)

(Record the name, grade, organization, office symbol, and telephone number of all officials with whom you have coordinated the Remedies Plan or who have provided comments on your plan; append any comments provided to the Remedies Plan.)

### *Figure H-3. Guide for Testing Defective Items Under Criminal or Civil Investigation*

#### Testing Defective Items Under Criminal or Civil Investigation

1. Under no circumstances is testing to proceed unless the command has committed sufficient funding to cover the entire cost of the projected testing.

2. No testing will be initiated unless there has been a written request for the testing to the appropriate Procurement Fraud Advisor from a criminal investigator or Assistant United States Attorney or Department of Justice Attorney (AUSA is used in these procedures to indicate either an AUSA or Department of Justice attorney). If they have not already done so, criminal investigators should be requested to coordinate their testing requests with the AUSA overseeing the investigation.

3. Barring extraordinary circumstances, only one test will be conducted to support the criminal and civil recovery efforts of a procurement fraud/irregularity matter. Early coordination with the Civil Division of Department of Justice or the local United States Attorneys Office is necessary to ensure that testing funds are not wasted.

4. The request for testing should include a clear, concise statement of the purpose of the testing to include a statement of the allegations made and the contact number(s) involved. *Any test plan which requires destructive testing must be approved by the AUSA.*

5. No testing will be initiated unless a test plan has been developed which states the following:

- a. the contract number(s) involved
- b. the National Stock Number (NSN) of the item to be tested
- c. the purpose of the testing
- d. the alleged defect or the contractual requirement violated
- e. the CID report of investigation (ROI) number or the DCIS case number
- f. cost of the test (a cost proposal should be an attachment to the test plan)
- g. where the test will be conducted
- h. how the test will be conducted
- i. the name and telephone number of the test team leader
- j. the names of all test team members
- k. the approximate dates of the testing
- l. the date that completion of the test is required
- m. a clear statement of the desired product (that is test report, raw data, analysis of results, evaluation of test results)
- n. the PRON to fund the testing
- o. a retention plan.

6. The test plan shall be coordinated with the concurrence received in advance from the appropriate personnel in the Procurement Directorate, Product Assurance and Test Directorate, the Procurement Fraud Advisor, and the investigator/AUSA requesting the test. No testing will be initiated until the criminal investigator/AUSA who requested the testing has approved the test plan.

7. If the items tested are to be retained as evidence, the criminal investigator should arrange for retention of the evidence. While the Command will support evidence retention, this is primarily the responsibility of the criminal investigators. Agents should be advised that putting items in Code L or similar non-use status is insufficient to protect it from being released to the field. *A decision not to retain the tested items as evidence must have the approval of the AUSA.*

8. All items to be tested should be from a statistically valid random sample. The sample should conform with the inspection requirements of the contract or be in conformance with a random sample specifically developed for the instant test plan. It is recommended that a statistician be consulted to determine the feasibility of a random sample specifically created to support the test plan.

9. Results of testing should be available to Command and DA personnel for appropriate contractual and administrative remedies.

Any request for testing results that indicates that dissemination of the testing results will be limited by Rule 6(e) of the Federal Rules of Criminal Procedure is to be forwarded through the MACOM or AMC Procurement Fraud Coordinator to DA Procurement Fraud Division prior to the initiation of any testing.

10. Resolution of problems associated with testing requests should be conducted at the local level. In AMC the authority to refuse a testing request resides with the Office of Command Counsel. Any disputes which cannot be resolved at the local level will be forwarded to the AMC or MACOM Procurement Fraud Coordinator for resolution. This includes disputes regarding funding or any time sensitive issues.

11. Second requests for testing of the same item due to a change in the investigative plan require coordination by the PFA with the investigator *and* AUSA overseeing the investigation to determine the deficiencies in the earlier test. Disputes which cannot be resolved between the AUSA, PFA, and investigator regarding testing are to be forwarded simultaneously to the MACOM Procurement Fraud Coordinator and PFD for resolution. The procedures established in paragraphs 5 and 6 apply for second requests for testing with the additional requirement that the Assistant United States Attorney must be requested to approve the test plan.

*Figure I-1. Guide for Seeking Legal Advice and Representation Before Office of Special Counsel*

Guide for Seeking Legal Advice and Representation Before Office of Special Counsel

1. Overview

a. DA employees or military members asked to provide information (testimonial or documentary) to OSC may obtain legal advice through the Labor Counselor from DA attorneys concerning their rights and obligations. This includes assistance at any interviews with OSC investigators. However, an attorney-client relationship will not be established unless the employee or military member—

(1) Is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act; and

(2) Has been assigned counsel by the DA General Counsel.

b. Any military member or employee who reasonably believes that he or she is suspected or has been accused by OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from DA. The counsel assigned will be from another DOD component whenever a DA attorney is likely to face a conflict between the attorney's eth-

ical obligation to the client and DA, or when the suspected or accused individual has requested representation from another DOD component. Outside legal counsel may be retained by DA on behalf of the member or employee under unusual circumstances and only with the personal approval of the DOD General Counsel.

c. The DA General Counsel will determine whether a conflict is likely to occur if a DA attorney is assigned to represent a military member or civilian. If the DA General Counsel determines a conflict may occur, or if the suspected or accused employee has requested representation from another DOD component, the DA General Counsel will seek the assistance of another General Counsel in obtaining representation outside DA.

2. Requests for Representation

a. To obtain legal representation, military members or civilian employees must—

(1) Submit a written request for legal representation through the Labor and Employment Law Office, Office of the Judge Advocate General, Department of the Army, to DA General Counsel, explaining the circumstances that justify legal representation. Copies of all process and pleadings served should accompany the request.

(2) Indicate whether private counsel, at personal expense, has been retained.

(3) Obtain written certification from their supervisor that—

(a) They were acting within the scope of official duties; and

(b) DA has not initiated any adverse or disciplinary action against them for the conduct being investigated by the OSC.

b. Requests for DA legal representation must be approved by the DA General Counsel.

c. The conditions of legal representation must be explained and accepted in writing by the member or employee.

3. Limitations on Representation

a. DA will not provide legal representation with respect to a DA initiated disciplinary action against a civilian employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct. This prohibition applies regardless of whether the participation or conduct is also the basis for the disciplinary action proposed by the OSC.

b. In certain situations, counsel provided by DA may be limited to representing the individual only with respect to some of the pending matters, if other specific matters of concern to the OSC or MSPB do not satisfy the requirements contained in this regulation.

## 4. Attorney-Client Relationship

a. An attorney-client relationship will be established and continued between the suspected or accused individual and assigned DA counsel.

b. In representing a DA employee or military member, the DA attorney designated as counsel will act as a vigorous advocate of the individual's legal interests before the OSC or MSPB. The attorney's professional responsibility to DA will be satisfied by fulfilling this responsibility to the employee or military member. Legal representation may be terminated only with the approval of the DA General Counsel and normally only on the basis of information not available at the time the attorney was assigned.

c. The attorney-client relationship may be terminated if the assigned DA counsel determines, with the approval of the DA General Counsel, that—

(1) The military member or civilian employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge; and

(2) Termination is not in violation of the rules of professional conduct applicable to the assigned counsel.

d. The DA attorney designated as counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise confidential communications between the client and the attorney.

## 5. Funding

This regulation authorizes cognizant DA officials to approve requests from military members or civilian employees for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation by the designated counsel.

## 6. Status

A military member's or civilian employee's participation in OSC investigations, MSPB hearings, and other related proceedings will be considered official departmental business for time and attendance requirements and similar purposes.

## 7. Advice to Witnesses

The following advice to military members and civilian employees questioned during the course of an OSC investigation may be appropriate in response to these frequent inquiries:

a. A witness may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's question.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verifications of an interview by OSC investigators are appropriate, whether or not the military member or civilian employee is accompanied by counsel. Tape recorders may only be used for this purpose when—

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC investigator agrees to record the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the investigator should be corrected before the member or employee signs the statement. The military member or civilian employee is not required to sign any written summary that is not completely accurate. A military member or civilian employee may receive a copy of the summary as a condition of signing.

## PART 518—THE ARMY FREEDOM OF INFORMATION ACT PROGRAM

## Subpart A—General Provisions

## REFERENCES

- Sec.  
518.1 References.  
518.2 References (Army).

## PURPOSE AND APPLICABILITY

- 518.3 Purpose.  
518.4 Applicability.

## DoD PUBLIC INFORMATION

- 518.5 ODISC4 Authority to approve exceptions.  
518.6 Public information.  
518.7 Control system.

## DEFINITIONS

- 518.8 Definitions and terms.  
518.9 FOIA request.  
518.10 Agency record.  
518.11 DoD component.  
518.12 Initial denial authority (IDA).  
518.13 Appellate authority.  
518.14 Administrative appeal.  
518.15 Public interest.  
518.16 Electronic data.  
518.17 Law enforcement investigation.

## POLICY

- 518.18 Compliance with the FOIA.  
518.19 Openness with the public.  
518.20 Avoidance of procedural obstacles.  
518.21 Prompt action on requests.  
518.22 Use of exemptions.  
518.23 Public domain.  
518.24 Creating a record.  
518.25 Description of requested record.  
518.26 Referrals.